

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re the Marriage of MONIQUE CAIN  
and CHIKA MBADUGHA.

B252478

(Los Angeles County  
Super. Ct. No. BD512372)

MONIQUE CAIN,

Respondent,

v.

CHIKA MBADUGHA,

Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Hank M. Goldberg, Judge. Affirmed.

Broedlow Lewis, Jeffrey Lewis and Kelly Broedlow Dunagan for Appellant.

Monique Cain, in pro. per., for Respondent.

\_\_\_\_\_

## INTRODUCTION

Chika Mbadugha (Husband) appeals from a judgment on reserved issues following dissolution of his marriage to Monique Cain (Wife).<sup>1</sup> He challenges the trial court's denial of his motion for new trial and its findings that he improperly received community funds. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### ***A. The Parties' Marriage and Dissolution***

Husband and Wife were married on August 2, 1994 and separated on September 3, 2009. They have two minor children.

Wife filed a petition for dissolution of marriage on September 17, 2009. The court dissolved the marriage on June 24, 2011.

On October 6, 2010, Wife filed for bankruptcy protection.<sup>2</sup>

Trial on reserved issues began on December 8, 2011 and concluded on September 20, 2012.

The trial court issued a tentative statement of decision on October 15, 2012. Husband filed objections to the tentative statement of decision. The trial court entered the judgment on reserved issues on July 26, 2013.

---

<sup>1</sup> Husband also purports to appeal from an order denying his motion for new trial and from two interlocutory orders. These are not appealable but are reviewable on appeal from the judgment. (See *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 133-134; *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1113, fn. 8.)

<sup>2</sup> We do not have the bankruptcy petition and schedules before us. The documents are not listed on the superior court's exhibit list and do not appear to have been lodged in the parties' exhibit notebooks. Based on the arguments raised by the parties and the trial court record, it appears that Wife did not disclose certain community assets on her schedules. We do not opine on the propriety of any of Wife's actions in the bankruptcy proceedings.

## **B. Statement of Decision and Judgment on Reserved Issues**

The court's 30-page statement of decision addressed the following issues:

### *1. Gianni Badu Company, Inc.*

The court found that Husband breached his marital fiduciary duty by failing to disclose a community asset, namely the community business, Gianni Badu Company, Inc. The court explained that “[d]uring this litigation, [H]usband claimed that he was merely an employee of a cosmetics company in Nigeria, U-Tonix, and not an owner of the company and its intellectual property rights. He posited that he created a company in this country[, Gianni Badu Company, Inc.,] only to transact business on the part of his employer[, U-Tonix]. He allegedly owned nothing relating to this business.”

The court found Husband's “testimony was preposterous. A great deal of documentary evidence contradicts [the] claim—his tax returns for the company reflecting cost of goods sold, his name and access to the company bank account, his registration and ownership of the trademarks on the products, and his extensive use of the corporate bank account to pay personal expenses. There was a complete lack of evidence to corroborate his claim that [h]is income was commissions and [the] claim is inconsistent with the tax returns. What he admitted to be part of his name, ‘Badu,’ is actually printed on some of the beauty products he claims not to be his.”

What the court found “[m]ost startling” was Husband's “testimony that handwritten business records . . . documenting detailed business transactions were ‘forged . . . [Wife] must have forged them.’ Later, he admitted that all of the pages of [business records] were in his handwriting and ‘she stole it from me.’ He said he copied these business records from business records in Nigeria due to the alleged unavailability of copy machines there. No credible explanation was offered as to why an ‘employee’ of the company needed such detailed records. The handwritten records establish that the alleged owner of the business, U-Tonix, was actually only one of his distributors. Not a shred of corroborating evidence was offered to support his claim that he is a mere employee and that others own the company and its trademarks.”

The court noted that “[a]s to the lack of business records and information given to [W]ife, [H]usband testified that ‘armed robbers stole invoices from [the] business.’ He testified that he could get the notes from U-Tonix, in Nigeria. Between this testimony and his next two court appearances he went to Nigeria and met with U-Tonix but produced no documents. [¶] The court found this testimony entirely not credible. [Husband’s] demeanor and manor [*sic*] testifying was evasive, defensive, non-responsive and he seemed to be making some of the testimony up as he went along. The testimony was willfully false and intended to deceive the court into not dividing community assets.” The court applied the principle that if a witness is willfully false in one part of his testimony, the court may choose to disbelieve the remainder of his testimony. “Accordingly, the court will not accept any uncorroborated self-serving testimony by [H]usband in this case.”

The court concluded Husband’s “testimony and intentional concealment of material evidence regarding the business’ characterization and existence is a breach of the marital fiduciary duty.” This breach resulted in the impairment of Wife’s interest in the community estate, because it made it impossible to value or divide the business and its assets. Therefore, because Husband acted with oppression, fraud or malice, under Family Code section 1101, subdivision (h),<sup>3</sup> the court found Wife was entitled to 100 percent of the undisclosed asset, i.e., Gianni Badu Company, Inc.

The court awarded Wife 100 percent of Gianni Badu Company, Inc., including its intellectual property, trade secrets, copyrights and formulas. It also awarded her “all registered trademarks and the transfer of any trademarks associated with the business and established by [Husband] during the marriage, including but not limited to CARIS,

---

<sup>3</sup> Family Code section 1101, subdivision (h), provides: “Remedies for the breach of the fiduciary duty by one spouse . . . when the breach falls within the ambit of Section 3294 of the Civil Code [providing for exemplary damages in cases involving oppression, fraud or malice] shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.”

RINA, EVERNATURAL AND EVITA.” The award also included customer and distributor databases, websites, telephone lines, and business documents.

*2. Funds Withdrawn from the Gianni Badu Company, Inc. Bank Account*

The court found that at the time of separation, the Gianni Badu Company, Inc. business account had \$94,579 in it. Less than three weeks later, Husband withdrew \$90,000 from the account. Some of it was later returned. Because Husband had control of the community account, the trial court reasoned he had the burden of demonstrating proper disposition of the funds. He failed to prove the funds were spent on legitimate business expenses. Therefore, the court determined Wife was entitled to half of the funds, or \$47,289.

*3. Community Vehicles*

Husband was in possession of a 2008 Nissan Pathfinder valued at \$5,000 at the time of separation. The court noted, “[h]e claims that his ‘boss, U-tonix’ actually owns the car and he was paying a loan on the car to them.” He had no documentary proof to support his claim, and no loan was reflected in his statement of assets and debts. The court awarded the Pathfinder to Husband subject to a \$2,500 equalizing payment.

A 2000 BMW X5 valued at \$12,000 was shipped to Africa during the marriage, and Husband admitted that he used the vehicle on his trips to Africa. Husband claimed the vehicle had numerous mechanical problems and provided the court with bills to support his claim, but these were mainly small bills for routine maintenance. The court noted that Husband’s “documentary evidence is emblematic of the type of wild goose chase caused by [H]usband’s lack of candor in this case.” The court ordered that Husband pay wife \$6,000 as to the BMW.

The court also found that Husband took a 2003 Honda Accord valued at \$5,000 after separation. It ordered that he pay Wife \$2,500 for this vehicle.

#### *4. Personal Property, Furniture and Artwork*

The trial court found that neither party presented evidence regarding personal property, furniture, artwork and its value. Therefore, it confirmed the property in each party's possession as his or her separate property, with no equalizing payments due.

#### *5. CalSTRS Retirement Account*

The court found a retirement account with a value of \$14,298 was community property. The court awarded it to Wife as her separate property subject to an equalizing payment to Husband of \$7,149.

#### *6. Equalizing Payment*

After making the property divisions and calculating the equalization payments, the court found Husband owed Wife \$66,246 and she owed him \$32,297. It therefore ordered Husband to pay Wife \$33,949 as an equalizing payment.

#### *7. Attorney's Fees*

The court granted Wife's request for attorney's fees in the amount of \$46,513 as a sanction under Family Code section 271.<sup>4</sup> It found Husband reasonably likely to have the ability to pay attorney's fees, considering Husband's "false income and expense

---

<sup>4</sup> Family Code section 271, subdivision (a), provides: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

declaration as constituting an admission of ability to pay.” In addition the court found, “[H]usband’s conduct . . . frustrated the policy of the law to promote settlement of litigation and, where possible, to reduce litigation costs by encouraging cooperation.” Specifically, Husband “presented dishonest testimony or false evidence in violation of the marital fiduciary duty . . . . Wife[] obtained her evidence only by photocopying it from the family residence or subpoenaing it and not because [H]usband produced it as required.”

### ***C. Motion for New Trial***

Husband filed a motion for new trial on September 16, 2013.<sup>5</sup> In part, he claimed that Wife should be judicially estopped from claiming a community interest in assets awarded to her because she failed to list those assets in her prior bankruptcy proceedings. He stated that Wife “filed for bankruptcy, and the court refused to allow her bankruptcy petition to be considered in evidence concerning her credibility. On September 14, 2012, [his] counsel offered a certified copy of [Wife’s] bankruptcy Petition and Schedules into evidence and the court refused to consider them.” Husband requested that the court take judicial notice of these documents and claimed that the court’s failure to consider them was an irregularity in the proceedings entitling him to a new trial.

Husband also claimed that the statement of decision was contrary to law because substantial evidence did not support the findings Husband took funds from the community—the Gianni Badu Company, Inc. bank account—and there was substantial evidence that Wife forged documents submitted to the court.

The court denied the motion for new trial on October 16, 2013. As to its refusal to consider the bankruptcy petition, the court explained that “[w]hen counsel sought to ask questions about this petition, he was asked to give an offer of proof. He explained, ‘In it she did not disclose the 401(k) plan that she had taken out. And it’s not set forth. If you

---

<sup>5</sup> Husband also filed a motion to vacate the judgment on September 17, 2013.

look at the list of assets that's not shown.' The court asked, 'I don't know why that's relevant. Why is that relevant?' The answer was, 'it shows the nondisclosure of an asset . . . that could have been used to pay off creditors in the bankruptcy . . . .' [Citation.] Later he said, 'as an offer of proof it does go to credibility.' Thus the sole explanation regarding its admissibility [was] that she failed to disclose the 401(k) and that went to 'credibility.' No further offer [of] proof or legal theory was offered. . . ."

"No other legal theory, such as judicial estoppel or any other legal or factual theory of admissibility was presented. Now [H]usband seems to be arguing, for the first time, that there were other inconsistencies between the bankruptcy petition and [W]ife's trial positions. But this was not argued at trial. Also, it is not factually supported. For example, he argues that [W]ife did not claim a community interest in his business on the bankruptcy schedules. One of the forms does request listing companies in which one owns more than a 5% interest. Did this require her to disclose a community interest in [H]usband's business? That she legally owned part of [H]usband's company was hotly contested and had not been judicially established at the time she filed the schedule. This theory was never presented and had the court allowed the examination, it would not have affected the outcome. The court's decision was mostly grounded on [H]usband's lack of credibility and the documentary evidence, not [W]ife's credibility. In short, the bankruptcy petition would not have changed the result. The court would not have applied the doctrine of estoppel had that theory been argued."

The court also rejected Husband's claim that the evidence was insufficient to support the judgment. It characterized his claim as an "effort to have the court reweigh its credibility and factual findings which are fully set forth in its statement of decision." The court declined to do so.



## DISCUSSION

### ***A. Timeliness of the Appeal***

On August 25, 2015, we sent a letter to the parties “requesting additional briefing to address the question of whether the appeal is timely such that the court has jurisdiction to consider it.” We noted that “[u]nder rule 8.104(a) of the California Rules of Court, a notice of appeal must be filed within 60 days after service of the notice of entry of judgment. Notice of entry of judgment in this case was served on July 29, 2013. Thus, to be timely, the notice of appeal must have been filed by September 27, 2013. It was not filed, however, until November 13, 2013. The time limits set forth in rule 8.104(a) are mandatory and jurisdictional. (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 842.)”

We recognized that “[r]ule 8.108(b) of the California Rules of Court does provide that if a party ‘serves and files a valid notice of intention to move for a new trial,’ the time for filing a notice of appeal is extended to the earliest of 30 days after notice of the entry of order denying the motion for a new trial is served or 30 days after denial of the motion by operation of law. [¶] Under Code of Civil Procedure section 659, subdivision (a)(2), a notice of intention to move for a new trial must be filed and served ‘[w]ithin 15 days of the date of mailing notice of entry of judgment.’ The 15-day time limit is jurisdictional. (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468.) Thus, the notice of intention to move for a new trial must have been filed by August 13, 2013 to be valid. It was not filed until September 16, 2013.” It appeared to us “that the notice of intention to move for a new trial was late and therefore not valid and did not serve to extend the jurisdictional time limits in which to file a notice of appeal,” and “that the appeal must be dismissed for lack of jurisdiction.”

In response, Husband moved to augment the record (Cal. Rules of Court, rule 8.155(a)) with a copy of a substitution of attorney filed December 11, 2012, substituting Steven L. Sugars as his attorney in place of Nathan Ucuzoglu. The notice of entry of judgment indicates that it was served on Ucuzoglu; it was not served on Husband or his then-counsel, Sugars. We therefore grant Husband’s motion to augment.

California Rules of Court rule 8.104(a) provides that “a notice of appeal must be filed on or before the earliest of: [¶] . . . [¶] (A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, showing the date either was served; [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment.”

In light of the substitution of attorney and notice of entry of judgment, there is nothing in the record to show when Husband and/or his counsel of record received notice of entry of judgment. “Under these circumstances, we will adhere to the ‘well-established policy, based upon the remedial character of the right of appeal, of according that right in doubtful cases “when such can be accomplished without doing violence to applicable rules.”’ [Citation.] Accordingly, we conclude the time for appeal did not expire until 180 days after the date of entry of the judgment, and therefore [Husband’s appeal] was timely.” (*Montgomery Ward & Co. v. Imperial Casualty & Indemnity Co.* (2000) 81 Cal.App.4th 356, 373; see also *In re Marriage of Lin* (2014) 225 Cal.App.4th 471, 475 [where no proper notice of entry of judgment served, ““outside time limit”” of 180 days for filing notice of appeal applied].)

***B. The Trial Court Did Not Err in Refusing To Grant Husband’s Motion For New Trial Based on his Judicial Estoppel Argument***

“The authority of a trial court to grant a new trial is established and circumscribed by statute. ‘[Code of Civil Procedure s]ection 657 sets out seven grounds for such a motion: (1) “[i]rregularity in the proceedings”; (2) “[m]isconduct of the jury”; (3) “[a]ccident or surprise”; (4) “[n]ewly discovered evidence”; (5) “[e]xcessive or inadequate damages”; (6) “[i]nsufficiency of the evidence”; and (7) “[e]rror in law.”’ [Citation.]” (*Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1227.)

Husband’s motion for new trial asserted all of the statutory grounds for a new trial except for jury misconduct. Many of his claims were nothing more than generalized

legal statements such as “[a] decision or verdict is against law if[] [citation]: [¶] There is a failure to find on a material issue; [¶] The findings are irreconcilable; or [¶] The evidence is insufficient in law and without conflict on any material point.” Husband did, however, allege a specific complaint of irregularity in the proceedings centered on the trial court’s exclusion of evidence—Wife’s bankruptcy petition and schedules.

Husband contends the court should have granted his motion for new trial because Wife “is judicially estopped from disclaiming community property assets in her bankruptcy and subsequently claiming [a community property interest in these assets] in this dissolution action.” These assets included Gianni Badu Company, Inc. and the three community property vehicles.

“We will not disturb the trial court’s determination of a motion for a new trial unless the court has abused its discretion. [Citation.] When the court has denied a motion for a new trial, however, we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion. [Citation.]” (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

Evidence Code section 354 is also relevant on the issue of a trial court’s exclusion of evidence. Evidence Code section 354 provides in pertinent part that “[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.” Thus, “[t]he failure to make a specific offer of proof constitutes waiver of a contention that the court erroneously excluded evidence.” (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 886.)

Prior to judgment, Husband made no mention of Wife’s bankruptcy and judicial estoppel. In response to the court’s inquiry during trial, Husband’s counsel stated that the

bankruptcy documents demonstrated Wife's creditors could have been paid with assets not otherwise disclosed. Husband's counsel later added "'as an offer of proof it does go to credibility.'" After considering the offer of proof, the court excluded the evidence.

Husband has never argued that the court erred in excluding the proffered bankruptcy documents based on the offer of proof made during trial. Instead, postjudgment in his motion for new trial and here, Husband argues a completely different theory of relevance for the admission of the documents into evidence. Husband concedes he "did not specifically assert the judicial estoppel doctrine during trial when [Husband] sought to introduce the bankruptcy petition."

A trial court does not abuse its discretion where it has properly excluded evidence and a different theory of relevance is later argued after judgment. Instead, as noted by the court here, the wrongfully excluded evidence claim based on a theory undisclosed at trial is waived. (*People v. Woodward* (2004) 116 Cal.App.4th 821, 832, citing Evid. Code, § 354 and *People v. Ramos* (1997) 15 Cal.4th 1133, 1179[.]) "Under these circumstances, [Husband] may not claim the evidence was erroneously excluded." (*Woodward, supra*, at p. 832 [theory of relevance argued on appeal different than that offered during trial waives review of the issue].)

Apparently recognizing his waiver and in an attempt to avoid it, Husband relies on *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10. He argues under the circumstances here, the waiver analysis does not operate.

*Hoffman-Haag*, however, is inapposite. *Hoffman-Haag* concerned a motion for new trial where "[e]rror in law" was alleged as the basis for the new trial. (Code Civ. Proc., § 657, subd. 7.) There the trial court considered a statute, not raised at trial, on undisputed facts; the motion for new trial raised a pure legal issue. *Hoffman-Haag* held that a new legal theory could be raised after judgment in a motion for new trial so long as the new theory was a question of law applied to undisputed facts. (*Hoffman-Haag v. Transamerica Ins. Co., supra*, 1 Cal.App.4th at pp. 15-16.)

Husband asserts the court committed an error in law in excluding Wife's bankruptcy documents from evidence.<sup>6</sup> He states that "under the circumstances of this case, the doctrine of judicial estoppel involves application of law (the judicial estoppel doctrine) to undisputed facts ([Wife's] non-disclosure of community assets to the bankruptcy court)." We disagree.

"An erroneous evidentiary ruling may, of course, be an error in law for which a new trial may be granted. [Citations.]" (*Richard v. Scott* (1978) 79 Cal.App.3d 57, 63, fn. 2.) Evidentiary rulings, however, often do not present pure legal issues like those envisioned in *Hoffman-Haag*. Instead, they present mixed questions of fact and law. (*Richard, supra*, at p. 63.) The legal issues concern the laws of evidence with respect to the admission of certain types of evidence. The factual issues involve the admissibility of the evidence under the facts of the particular case.

As explained in *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, "[t]he doctrine of judicial estoppel precludes a party from taking inconsistent positions in separate judicial proceedings. [Citation.] It ""is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. . . . "The policies underlying preclusion of inconsistent positions are 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.'" . . . Judicial estoppel is "intended to protect against a litigant playing 'fast and loose with the courts.'" [Citation.]" (*Id.* at p. 841.) The requirements for application of judicial estoppel are: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in

---

<sup>6</sup> While Husband cited error in law as one of his many grounds for a new trial, his argument was not specific. After setting forth general legal principles, Husband states: "In the present case, the court should not have refused to consider [Wife's] bankruptcy petition and schedules. The Petition was offered and the court simply dismissed it and refused to consider it. . . . This was an abuse of discretion which violated [Husband's] right to [a] fair and impartial trial. Consequently, a new trial should be granted."

asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’ [Citation.]” (*Id.* at p. 842.)

In *The Swahn Group, Inc.*, one of the questions was whether the trial court erred in applying judicial estoppel when it considered a demurrer. The court concluded that the trial court could consider a challenge to a complaint on judicial estoppel grounds only if the facts pleaded established that the doctrine applied as a matter of law. (*The Swahn Group, Inc. v. Segal, supra*, 183 Cal.App.4th at pp. 843-844.) The court made clear that if there is a question as to whether the two positions are totally inconsistent, or whether the first position was taken as a result of ignorance, fraud, or mistake, then the application of judicial estoppel is a question of fact. (See *id.* at p. 843.)

*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995 is illustrative. *Cloud* concerned a debtor’s failure to set forth a potential claim she held against her employer on her bankruptcy schedules. The defendant employer filed a motion for judgment on the pleadings arguing that the plaintiff debtor was judicially estopped from pursuing her claim because of her failure to set forth the potential claim in her bankruptcy schedule. The trial court granted the motion and the Court of Appeal reversed. It found that “a defense of judicial estoppel raises factual issues.” (*Id.* at p. 1000.) The Court of Appeal explained that “nondisclosure in bankruptcy filings, standing alone, is insufficient to support the finding of bad faith intent necessary for the application of judicial estoppel.”<sup>7</sup> (*Id.* at p. 1019.)

Here, as noted by the court, whether Wife “legally owned part of [H]usband’s company was hotly contested and had not been judicially established at the time she filed the schedule.” Moreover, there was no evidence before the court whether Wife took the position as a result of ignorance, fraud or mistake. Thus, the court impliedly found there

---

<sup>7</sup> Husband concedes “[t]here was no evidence introduced below at any time suggesting ignorance, fraud or mistake.”

was a question of fact as to whether Wife took totally inconsistent positions and, if so, whether she did so willfully or due to ignorance, fraud, or mistake.

Whether Wife should be judicially estopped is not a pure legal matter as asserted by Husband; there are factual issues that require resolution. Application of judicial estoppel here is a factual question Husband did not ask the court to address during trial. Accordingly, Husband's failure to raise the theory of judicial estoppel during trial waived his ability to complain about the evidence to support that theory as having been excluded.

### ***C. The Trial Court Did Not Err in Refusing To Grant Husband's Motion For New Trial Based on New Evidence***

Husband claims the trial court erred in denying his motion for a new trial based on "[n]ewly discovered evidence." (Code Civ. Proc., § 657, subd. 4.) Husband asserts that Wife made "secret payments . . . to her sister." He contends that he presented new evidence in his motion for new trial, Wife failed to "rebut that showing," and a new trial or "at the least" an equalization payment is therefore required. Husband presented copies of 18 checks and his declaration in support of his new evidence claim.

Husband explained in his supporting declaration that after trial, he "was able to obtain evidence not disclosed by [Wife] in pretrial discovery which establishes that [Wife] made previously undisclosed transfers to [her] sister which appear to have been used to pay for a mortgage on another property that [Wife] and her sister had invested in and which presumably [her] sister was holding title to for both of their benefit."

"In ruling on a motion for a new trial based on newly discovered evidence, the trial court considers the following factors: "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.'"

[Citations.]' [Citation.]" (*People v. Howard* (2010) 51 Cal.4th 15, 43, citing *People v. Delgado* (1993) 5 Cal.4th 312, 318.)

Husband made no showing in his motion for new trial that he could not have discovered what he alleged was new evidence with reasonable diligence. Husband's declaration in support of his motion for new trial merely states that "[a]fter the conclusion of the trial, I was able to obtain evidence not disclosed by [Wife] in pretrial discovery . . . ." Husband made no showing that he had actually requested the information through discovery or that he could not have otherwise discovered the information in advance of trial with reasonable diligence.

Given Husband's failure to provide an explanation to the court as to why he could not have produced the new evidence prior to or during trial,<sup>8</sup> the court did not abuse its discretion in denying Husband's motion for new trial on his newly discovered evidence theory. Further, Husband is not without a remedy here. As noted by the court, "the proper vehicle for such a claim is to make a motion under Family Code section 2556<sup>[9]</sup> to treat such matters as omitted assets, and not to grant a new trial as to unrelated issues."

***D. Substantial Evidence Supports the Court's Findings Concerning the Funds Withdrawn from the Gianni Badu Company, Inc. Bank Account***

At the time of separation, the bank account for the community business, Gianni Badu Company, Inc., held \$94,579. The court awarded Wife half of the funds in the account. It concluded that because Husband had control of the account, he had the burden of demonstrating proper disposition of the community funds.

---

<sup>8</sup> The trial occurred over the course of 4 days in a span of nine months.

<sup>9</sup> Family Code section 2556 provides: "In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability."



The court found “Husband’s alleged accounting [of the funds in the account] is entirely unsatisfactory. He has attempted to show that the funds were spent on legitimate business expenses and, therefore, legitimately disappeared. If the court accepted this, the court would deny [W]ife’s claim” to half of the funds.

The court noted that large amounts of money flowed into and out of the account after separation. Husband claimed the outgoing money was for business expenses, but he did not report any corresponding business income. “In other words, [H]usband’s position is that the large cash reserves simply vanished post separation, presumably producing no income and therefore leaving absolutely nothing to divide between the parties. The court does not accept this.”

The court concluded that “[t]he evidence and timing of the events together with the court’s other observations regarding [H]usband’s credibility and motives and the paucity of documentary evidence to corroborate his claims, strongly suggests that [H]usband intended to deprive the community of this asset as well. The court makes this finding by a preponderance of the evidence. The court, however, is not convinced by clear and convincing evidence that this asset was misappropriated by oppression, fraud, or malice. There is a possibility that [H]usband did in fact properly use the money on business expenses and there are no offsetting profits to be divided.”

Husband contends the court’s findings concerning the business bank account are not supported by substantial evidence. He asserts that he “did account for the expenditures and that evidence was presented below without contradiction.” “His evidence included a detailed accounting of 32 transactions showing the disposition of the funds.” It showed the funds taken from the account “are accounted for as having been expended on legitimate business expenditures or community expenditures.” In support of his contention, Husband cites his objections to the statement of decision and his declaration in support of his motion for new trial.

In addressing a claim that there is insufficient evidence to support the judgment, “we start with the presumption that the record contains evidence sufficient to support the judgment. It is the appellant’s affirmative burden to demonstrate otherwise. [Citation.]”

(*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 33; accord, *Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 80.) The appellant must set forth all the material evidence, both “favorable and unfavorable, and show how and why it is insufficient.” (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738, italics omitted.) The appellant must also “faithfully recite the facts supporting the” judgment (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96), supporting each factual reference with an appropriate citation to the record (Cal. Rules of Court, rule 8.204(a)(1)(C); *American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 284). Failure to accurately set forth the evidence in the record forfeits on appeal the challenge to the sufficiency of the evidence. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52-53; *Brockey, supra*, at pp. 96-97.)

Husband has failed to meet his burden of demonstrating error. His brief does not contain citations to the evidence introduced at trial which he claims is insufficient to support the judgment. All it contains is citations to his posttrial arguments and declaration. Moreover, to the extent these documents refer to evidence or exhibits in the record, they do not establish that there is insufficient evidence to support the trial court’s findings and judgment.<sup>10</sup>

For example, in his objections to the statement of decision, Husband sets forth a generalized list of amounts, to whom those amounts were paid, and in some cases a check number. The two largest expenditures—\$40,000 and \$30,000—went to “COBECHEM (MANUFACTURER).” There is no reference to any supporting documentation in the

---

<sup>10</sup> This court reviewed various exhibits referenced in Husband’s objection to the written decision. Exhibits 19 and 20 contain copies of cancelled checks dated from January 9, 2009 to April 15, 2010 showing various payees. Exhibit 25, pages 640-646, are copies of two bank statements for September 30, 2009, one for Husband and one for the community business. Exhibit T contains five different purchaser copies of cashier’s checks dated November 20, 2009 through January 8, 2010 ranging in amounts from \$32,000 to \$90,000. The cashier’s checks are made payable to the community business, Gianni Badu Company, Inc. and show Husband as the purchaser. These exhibits are insufficient to establish Husband’s claim before this court.

record that establishes that this money in fact was used for the manufacture of products for Gianni Badu Company, Inc. The trial court was not required to accept as true Husband's statement that the money was used for this purpose, even if uncontradicted. (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1487; *Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1033; see also *In re Marriage of Janssen* (1975) 48 Cal.App.3d 425, 429 ["trial court was not required to accept [husband's] self-serving testimony of his inability to pay [wife's] fees and costs"].)

Here, the trial court did not believe Husband's testimony and exhibits, even if uncontradicted, when they were unsupported by other documentary evidence. The court made numerous findings that Husband's uncorroborated testimony was not credible or trustworthy.<sup>11</sup> Husband has not established that the trial court's findings as to the Gianni Badu Company, Inc. bank account are not supported by substantial evidence.

---

<sup>11</sup> The court specifically noted that Husband's uncorroborated and self-serving testimony had little probative value. The trial court found some of Husband's testimony "preposterous" and "dishonest." It found that he presented false evidence and that he lacked candor.

## **DISPOSITION**

The judgment is affirmed. Wife is to recover her costs on appeal.

BECKLOFF, J.\*

We concur:

ZELON, Acting P. J.

SEGAL, J.

---

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.